

NOTICE: Summary decisions issued by the Appeals Court pursuant to its rule 1:28, as amended by 73 Mass. App. Ct. 1001 (2009), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

18-P-1177

WALTER F. SORENSEN

vs.

SARAH O. SORENSEN.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The husband in this divorce action filed timely notices of appeal from the underlying divorce judgment, dated December 2015, and two judgments on complaints for contempt, dated February and September 2016, respectively. In April 2018, after the register's office of the Essex Division of the Probate and Family Court Department (Probate Court) issued a notice of intent to dismiss the appeals for lack of prosecution, the husband moved to enlarge the time to assemble the records. A judge denied the motion, and, consequently, all three appeals were later dismissed by the register. The husband now appeals from the dismissals.

Appeal from divorce judgment. After timely moving to amend the divorce judgment, the husband filed a notice of appeal in March 2016. In December 2016 the husband delivered the

transcripts of the entire divorce trial to the register's office.

An employee of the register's office, Matthew D. McWade, testified at the hearing on the husband's motion to enlarge the time to assemble the records. According to McWade, sometime after the husband filed the trial transcripts, McWade told the husband that he needed to submit "a simple letter requesting an assembly of the record." McWade testified that this was "not a rule in the book," but a "practice" of the Probate Court in Essex County. McWade confirmed that the husband did not at any time request that the register's office not assemble the record.

In denying the husband's motion, the judge concluded that the husband failed to prosecute his divorce appeal, requiring its dismissal, because he did not submit a letter requesting assembly of the record as directed by the register's office. This conclusion was legally erroneous and therefore an abuse of discretion. Although "the responsibility for expediting appeals is 'squarely on the appellant,'" "an appeal should not be dismissed for failure to follow the rules of appellate procedure if the error was not attributable to the appellant." Hawkins v. Hawkins, 397 Mass. 401, 408 (1986), quoting Mailer v. Mailer, 387 Mass. 401, 407 (1982). Here, there was no error attributable to the husband because the rules of appellate procedure do not require appellants to request that the clerk or

register of the lower court assemble the record. To the contrary, Mass. R. A. P. 9 (a), as amended, 417 Mass. 1601 (1994), provides that it is the clerk's responsibility "as soon as may be after the filing of the notice of appeal" to assemble the record.¹

The wife argues that, by not submitting the letter that McWade referenced, the husband failed to comply with Mass. R. A. P. 9 (c) (1), as amended, 378 Mass. 935 (1979), which requires appellants to "perform any act reasonably necessary to enable the clerk to assemble the record." But we do not agree that the letter constituted a "reasonably necessary" act. The husband delivered transcripts of the full divorce trial to the register's office in accordance with Mass. R. A. P. 9 (c) (2), as amended, 437 Mass. 1602 (2002). Once he did so, the register's office was responsible for completing assembly of the record and transmitting it to the clerk of the appellate court. See Mass. R. A. P. 9 (a), (d), as amended, 417 Mass. 1601 (1994). As the husband complied with his obligations under the

¹ Throughout this memorandum and order, we refer to the version of the appellate rules in effect in 2016, when the husband filed his notices of appeal. But we note that the current version of the rules, which took effect on March 1, 2019, likewise contains no requirement that an appellant request that the clerk or register assemble the record. See Mass. R. A. P. 9 (a), (e), as appearing in 481 Mass. 1615 (2019).

rules, his appeal from the divorce judgment should not have been dismissed.

Appeals from contempt judgments. On the other hand, the judge did not abuse her discretion in concluding that the husband failed to prosecute his appeals from the contempt judgments. The husband received the recordings of the two contempt hearings in April and November 2016. As the judge found, the husband then failed to file the transcripts "despite having almost two years to do so" and "offered no excuse for this delay." Although the husband claimed in his motion that he had ordered the transcripts and was waiting to receive them, the judge determined that he had not requested the transcripts in a timely manner. The husband has failed to show that the judge abused her discretion in this respect.

Conclusion. So much of the order dated July 18, 2018, dismissing the husband's appeal filed on March 4, 2016, from the divorce judgment is vacated; the appeal shall be reinstated; and

the register shall forthwith complete assembly of the record.

The order is otherwise affirmed.

So ordered.

By the Court (Agnes, Shin & Wendlandt, JJ.²),

Joseph F. Stanton
Clerk

Entered: June 14, 2019.

² The panelists are listed in order of seniority.